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Supreme Court of the United States

OCTOBER TERM, 1905

No. 118

SOFRE L. ALEXANDER, *APPELLANT*,

vs.

SEFERINO CROLLOTT, JUSTICE OF THE PEACE OF PRECINCT 13, OF THE COUNTY OF BERNALILLO, AND TERRITORY OF NEW MEXICO, *APPELLEE*.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF OF APPELLANT

NEILL B. FIELD,
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STATEMENT OF THE CASE.

This appeal brings up for review the action of the Supreme Court of the Territory of New Mexico in quashing a writ of prohibition theretofore issued by one of the justices of that court under the following

circumstances. One Andrew W. Cleland, on the 14th day of June, 1904, in the court of the Justice of the Peace of Precinct No. 13, of the County of Bernalillo, in the Territory of New Mexico, began five separate actions of unlawful detainer against the appellant, Sofre L. Alexander, and four other persons, tenants of Alexander, seeking to oust the defendants, respectively, from the possession of certain lots of land, with the improvements thereon, situate in the Paris Addition to the City of Albuquerque. The complaint in each case failed to allege that plaintiff had ever been in possession, but alleged that, on the 7th day of June, 1904, the said Cleland *was lawfully entitled to the possession* of a tract of land, with a tenement thereon, describing it, and, being so thereof lawfully entitled to the possession, the defendant, unlawfully and with force, entered into and upon the said tract of land, and detained and held possession thereof, and detains and holds possession thereof, against the plaintiff. Process was issued by the justice, which required the respective defendants to "answer and defend against the complaint of A. W. Cleland the *forcible entry* and unlawful detainer made (by the defendant named in the writ) upon the lands of the said A. W. Cleland," etc., and, on the return day, the several defendants appeared by counsel and filed their respective answers, in which they denied under oath the allegations of the complaint, and set up, by way of affirmative defense, that the appellant, Alexander, had been in possession of the several tracts of land since the month of December, 1902, claiming in good faith to be the owner thereof,

and that there then was, and for a long time prior thereto had been, pending in the district court of Bernalillo county, a suit in equity, wherein the said Alexander was plaintiff, and the said Cleland was defendant, in which the said Alexander was seeking to establish his title to the tract of land described in the complaint, and to various other tracts and parcels of land in the county of Bernalillo, and that said suit was undetermined in the said district court; and the defendants severally challenged the jurisdiction of the justice of the peace. On the 24th of June, 1904, judgment was rendered in each case in favor of the plaintiff in the following form:

> "This cause coming on this day for hearing, and the respective parties being present with their attorneys, and the court having taken the case under advisement at the hearing on yesterday, the court now, on this 24th day of June, 1904, finds for plaintiff, and adjudges the defendant *guilty of the forcible entry* and unlawful detainer complained of against him, in the complaint of the plaintiff, and the court does order and adjudge that the defendant be removed from the premises described in the complaint, and particularly described as lot .....in block ..... in the Paris addition, and that the plaintiff be put in possession thereof, and that the plaintiff do have and recover of the defendant as his damages, the sum of three dollars, together with the costs of this proceeding, and that warrant of removal issue, with a clause commanding the officer to levy said damages and costs, as provided by the statute."

Transcript p. 18.

Whereupon the defendant Alexander applied to the

Hon. Wm. H. Pope, one of the Associate Justices of the Supreme Court of the Territory, for a writ of prohibition, and the same was allowed on the 28th day of June, 1904, after judgment but before the issuance of the orders of removal by the justice of the peace.

The statute under which the writ of prohibition was applied for and allowed is as follows:

"Sec. 2775. Writs of prohibition shall only be issued out of the Supreme Court, and shall be applied for upon affidavit, by motion to the court, or a judge thereof in vacation, and if the cause shown appears to the court or judge to be sufficient, a writ shall be thereupon issued, which shall command the court and party, or officer to whom it is directed, to desist and refrain from any other proceedings in the action or matter specified therein, until the next term of said supreme court, or the further order of the court thereon; and to show cause at the next term of said court, or some day to be named in the same term, at the option of the court, if issued in term time, why they should not be absolutely restrained from any further proceedings in such action or matter.

"Sec. 2776. Such writ shall be served upon the court and party or officer to whom it is directed, in the same manner as a writ of mandamus, and a return shall be made thereto by such court or officer, which may be enforced by attachment.

"Sec. 2777. If the party to whom such writ is directed shall, by an instrument in writing, to be signed by him and annexed to such return, adopt the same return, and rely upon the matters therein contained as sufficient cause why such court should not be restrained, as mentioned in said writ, such party shall thenceforth be deemed the defendant in such proceeding, and the person prosecuting

such writ may take issue or demur to the matters so relied upon by such defendant.

"Sec. 2778. If the party to whom such writ is directed shall not adopt such return, the party prosecuting such writ shall bring on the argument of such return, as upon a rule to show cause; and he may, by his own affidavit and other proofs controvert the matter set forth in such return.

"Sec. 2779. The court, after hearing the proofs and allegations of the parties, shall render judgment either that a prohibition absolute restraining the said court and party, or officer, from proceeding in such action or matter, do issue, or a writ of consultation authorizing the court and party, or officer, to proceed in the action or matter in question, and may make and enforce such order in relation to costs and charges and the amount thereof as may be deemed just.

"Sec. 2780. If the party to whom such first writ of prohibition is directed adopts the return of the court thereto, and judgment is rendered for the party prosecuting such writ, a prohibition absolute shall be issued, but if judgment is given against such party, a writ of consultation shall be issued as above provided."

C. L. N. M. 1897, *pp.* 731-732.

In his affidavit, upon which was based his application for the writ of prohibition, the appellant stated that he had erected five houses upon the lands described in the several complaints long prior to the 7th of June, 1904, and that he had been in the continuous, actual possession of all of said property since the month of December, 1902, by himself and his tenants; and gave a history of the proceedings in the said several actions, and then alleged:

"That, upon the hearing of said several causes, this affiant and the other defendants in the said

several actions moved the said justice of the peace to desist and refrain from the determination of said suits, because of the want of jurisdiction in said justice of the peace to try and determine the question of title raised by the said several answers, but the said justice of the peace overruled said motion and proceeded to and did give judgment in favor of the said plaintiff, and against each of said defendants for their removal from the several tracts of land described in said several complaints, and for damages and costs against each of said defendants respectively, copies of which said judgments are hereto attached, made a part hereof, marked respectively Exhibits Numbered 16, 17, 18, 19 and 20.

"That affiant is informed and believes, and therefore states the facts to be, that each of the said judgments is void because of want of jurisdiction in the said justice of the peace to try and determine the question of title raised by the said respective answers, but the said justice of the peace will, unless prohibited by this court, issue final process upon the said void judgments to carry the same into effect.

"That the title under which the said A. W. Cleland claims the right of possession to the said several tracts of land in the said several complaints described, is common to all of the said several tracts, and the title which this affiant seeks to establish to the said several tracts of land, in and by the said suit now pending in the district court of Bernalillo county, hereinbefore mentioned, is common to the said several tracts of land, and that all of the defendants in the said several actions claim under this affiant; that the question of title raised by the said several answers is the same question of title in all of said suits.

* * * * * *

"That although this affiant, and the defendants

in the other of said actions, moved and requested the said court to have the record of the proceedings in said causes, and the judgments therein, show that the only issue raised by this affiant and said other defendants was that of the question of the jurisdiction of said court to try the question of title raised by their said answers in said actions, which, as hereinbefore stated, was the fact, the said court refused to make such entry and to have the record of said causes and the judgments therein, show this fact, and thereupon entered the several judgments, copies of which have been heretofore attached to, and made a part of this record."

Transcript pp. 4-5.

It is provided by the Organic Act of the Territory that:

* * * "The jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts and of justices of the peace, shall be as limited by law: *Provided,* That justices of the peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute,"

* * *

9 *Stat.* 449-450.

What is now Section 3256 of the Compiled Laws of New Mexico of 1897, was originally enacted in 1852 in its present form:

"If it appear on the trial of any cause from the evidence, that the title to lands is in question, the justice shall immediately make an entry thereof on his docket and cease all further proceedings."

C. L. N. M. 1865, *p.* 142, *Sec.* 31.

Laws of 1852, *p.* 303.

On December 18th, 1851, the legislature of New

Mexico passed an act to regulate the actions of forcible entry and unlawful detainer, of which the portions material to be considered are as follows:

"Section 1. That an action for forcible entry or unlawful detainer of real property may be prosecuted before any justice of the peace in the township where the property is situated, in the following cases:

"1st. Where the defendant has, by force, intimidation, fraud, or stealth, entered upon the land and tenements of another, and detains the same.

"2d. Where a lessee or tenant holds over after the termination or contrary to the terms of his lease or tenancy.

"3d. Where the tenant fails to pay the rent at the time stipulated for payment.

"4th. Where the defendant continues in possession after a sale by foreclosure of mortgage, or on execution, unless he claims by a title paramount to the mortgage by virtue of which the sale was made, or by title derived from the purchaser at the sale.

* * * * * * *

"Sec. 9. The question of title cannot be investigated in this action, nor boundaries of land, and nothing herein contained shall prevent a party from suing for a trespass, or in ejectment, or from testing the right of property in any other manner."

C. L. N. M. 1865, *pp.* 178-180.

This act provided for a complete system of procedure in forcible entry and unlawful detainer cases, including the right of appeal to the district court, and for a trial *de novo* in the district court, upon such appeal. All of its essential features have continued as part of the statute law of the Territory to the present time, with

some immaterial modifications as to the time and manner of taking appeals, etc.

In 1889, the legislature passed an act in the following language:

> "Section 1. That the first sub-division of Section 2421 of the Compiled Laws of New Mexico of 1884 shall be amended to read thus: First. When the defendant by force, intimidation, fraud or by stealth enters or shall have entered in the lands and tenements of another and detains the same, for the purpose of proving any of the reasons or causes herein enumerated, *it shall not be necessary to show that there was force, intimidation or fraud apparently or physically* and it shall be *sufficient* to prove that defendant entered upon and *occupies the premises against the will or consent of the owner or owners thereof;* and that after having been notified by the owner, his agent or attorney to vacate the same, he refused to do so." There is the usual repealing clause.
>
> *Laws of* 1889, *p.* 224.

This was obviously an attempt on the part of the Territorial legislature to enlarge the jurisdiction of justices of the peace in cases involving the right to possession of lands, and was probably brought about by a decision of the supreme court of the Territory in the case of *Romero vs. Gonzales,* (3 N. M. 5.)

Appellant insists that a justice of the peace in New Mexico cannot be invested with jurisdiction to ascertain and determine any question of "ownership" of land; that whatever interpretation may be given to the word "owner," as used in the act in question, no known definition of the word could justify its use to signify necessarily one in the actual, prior possession

of land, although it might, of course, include such an one. If the act of 1889 is a valid enactment, there is only this distinction between the action of ejectment, and the actions of forcible entry and unlawful detainer: if sued before a justice of the peace, defendant cannot show title in himself, or a third person, to defeat the plaintiff; if sued in the district court, he can, while the proof required of plaintiff, in each forum, is the same. It is true that the plaintiff, in the latter actions, is required to *allege*, in his complaint, that the entry or detention was by force, stealth or fraud, but the legislature has attempted to dispense with the necessity of proving this allegation, and has left the facts necessary to be proved in each case identical. For the purpose of comparison, I set out the material parts of both statutes:

"Sec. 3345. An action for forcible entry or unlawful detainer of real property may be prosecuted before any justice of the peace in the precinct where the property is situated, in the following cases:

"First. When the defendant, by force, intimidation, fraud or by stealth, enters or shall have entered in the lands and tenements of another and detains the same, for the purpose of proving any of the reasons or causes herein enumerated, it shall not be necessary

"Sec. 3160. The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

* * * * *

"Sec. 3164. It shall be sufficient for the plaintiff to declare in his petition that on some day, in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the petition, afterwards entered into such premises, and unlawfully withheld from the plaintiff the

to show that there was force, intimidation or fraud apparently or physically; and it shall be sufficient to prove that defendant entered upon and occupies the premises against the will or consent of the owner or owners thereof, and that after having been notified by the owner, his agent or attorney to vacate the same, he refused to do so.

"Second. When a lessee or tenant holds over after the termination or contrary to the terms of his lease or tenancy.

"Third. When the tenant fails to pay the rent at the time stipulated for payment.

"Fourth. When the defendant continues in possession after a sale by foreclosure of mortgage, or on execution unless he claims by a title paramount to the mortgage by virtue of which the sale was made, or by title derived from the purchaser at the sale.

* * * * *

"Sec. 3352. If the defendant is found guilty, judgment shall be entered against him for damages, and that he be removed possession thereof, to his damage, for any sum he may name.

* * * * *

"Sec. 3166. To entitle the plaintiff to recover in an action of ejectment, it shall not be necessary for the plaintiff to prove that at the time of the commencement of the action the defendant was in possession of the premises claimed, but the fact of such possession shall be taken as admitted by the defendant upon his filing a plea of not guilty.

* * * * *

"Sec. 3168. It shall be sufficient to entitle the plaintiff to recover, to show that at the time of the commencement of the action the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof.

* * * * *

"Sec. 3172. If the plaintiff prevail, the judgment shall be for the recovery of the possession, and for the damages and costs.

"Sec. 3173. Upon judgment for the recovery of possession, a writ of possession shall be issued,

from the premises, and that the plaintiff be put in possession thereof; and warrant of removal shall issue accordingly to which shall be added a clause commanding the officer to levy the damages and costs as in ordinary cases."

C. L. N. M. 1897.

and the sheriff shall deliver to the plaintiff the possession of the premises, and also collect the damages and costs, as on execution in other cases."

C. L. N. M. 1897.

The jurisdiction of the justice of the peace must be measured by what the legislature has attempted to authorize him to do, and not by the name which it has seen fit to give to the proceeding. If the act in question is valid, the writ of prohibition should not have been granted in the first instance; but if it is not—if it is an attempt on the part of the legislature to invest a justice of the peace with jurisdiction which the organic act says he shall not have—then certainly appellant was under no obligation to appeal from a void judgment, and the appeal allowed by the Territorial statutes is not an adequate remedy. The statute regulating these appeals is as follows:

> "Sec. 3358. An appeal shall be allowed to the district court in all cases wherein judgment may be hereafter rendered in forcible entry and unlawful detainer, or both: *Provided*, Such appeal be so taken within ten days after the rendition of such judgment, and the appellant executing a good and sufficient appeal bond, in a sum to be fixed by the justice trying the cause, conditioned according to law as now in force.
>
> "Sec. 3359. The district court on the trial of an appeal, shall proceed *de novo*, and may assess damages as aforesaid up to the time of final judg-

ment against the defendant, and the security in the appeal bond shall be liable with the principal for the damages so assessed, and said court may issue a warrant of removal or restitution as the case may require.

"Sec. 3360. On appeals being taken to the district court, in any action of forcible entry and unlawful detainer, if the plaintiff recovers judgment, the damages assessed shall be the actual value of the rents due up to the rendition of judgment by the justice of the peace, and double the value of all rents accrued, after the rendition of judgment by the justice of the peace, and up to the rendition of judgment in the district court, and if an appeal be afterwards taken therefrom to the supreme court, and judgment for plaintiff be there affirmed, said plaintiff shall have the right to recover further damages at double the actual value of the rents of the property from the time of the rendition of judgment in the district court to the time of the delivery of possession to him, and shall have the right to sue for the same on the appeal or supersedeas bond given in the district court, which shall be fixed at a sum sufficient to cover such last mentioned damages, as also all damages and judgments rendered in the district court, which said bond shall contain a condition that the defendant appealing or taking a writ of error will pay all such judgment and damages if the judgment of the district court be affirmed.

"Sec. 3361. On appeals taken from a judgment of a justice of the peace, the bond shall be in sufficient sum to cover all damages and judgment recovered in the justice of the peace court, as also all damages and judgment that may be rendered and recovered in the district court. And the district court may, on motion, require an additional bond to be given in any such case, and should the appellant fail to give such bond when required by the district court within the time that may be required,

then the said appeal shall be dismissed and the judgment below affirmed, and additional damages in accordance with this act assessed, and judgment, execution and a writ of possession then given by the district court."

C. L. N. M. 1897.

The only judgment which the district court could render upon such an appeal would be to dismiss the case for want of jurisdiction in the justice of the peace. That such an appeal is not an adequate remedy to a party who has been for years in the peaceable possession of lands, claiming to be the owner of them; who has erected houses, and has let them to tenants, who recognize him as their landlord, seems to be obvious. In ejectment, he could not be required to give bond in order to maintain his possession pending the litigation, and there is no apparent reason why he should be required to do, in a proceeding before a justice of the peace, what he could not be required to do in a like proceeding before the district court. Appellee has given notice of a motion to dismiss, but the argument in support of his motion is met and overcome by the decision of this court in the case of *Smith vs. Whitney,* (116 U. S. 167.) There was no return to the writ of prohibition, and the allegations of the affidavit on which it is based must therefore be taken as true.

The appellant has assigned the following errors:

I.

The court erred in assuming jurisdiction of this cause before the return term of the writ of prohibition.

II.

The court erred in sustaining the motion of the ap-

pellee to quash the writ of prohibition.

III.

The court erred in rendering judgment against appellant.

POINTS AND AUTHORITIES.

I.

THE MOTION TO DISMISS IS MISCONCEIVED.

Counsel for appellee has filed a motion to dismiss the appeal in this case, and a brief in support of it, in which brief he says:

> "Appellee insists that this appeal should be dismissed, because the order quashing the writ of prohibition was an order quashing final process and no appeal lies therefrom.
>
> "The judgment of the justice of the peace had already been rendered. The only question sought to be accomplished by the writ of prohibition was to prevent the execution of final process on the judgment. If the judgment was a nullity it could have been corrected by appeal and also by a bill in equity to enjoin its execution, and prohibition wasn't necessary."

Counsel then proceeds to argue, apparently, that the judgment of the supreme court of New Mexico quashing the writ of prohibition is not a final judgment, and cites numerous authorities, all of which relate to final process. The entire contention is met by the decision of this court in the case of *Smith vs. Whitney*, (116 U. S. 167), where this court said, p. 173:

> " * * * But where that court has clearly no jurisdiction of the suit or prosecution instituted be-

fore it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error."

II.

THAT THE JUSTICE OF THE PEACE, WHOSE ACTION WAS SOUGHT TO BE PROHIBITED, WAS WITHOUT JURISDICTION, IS APPARENT ON THE FACE OF THE RECORD.

It may be conceded that, if the Territorial legislature has power to invest a justice of the peace with jurisdiction, in any form of action, or by any method of procedure, to oust a person in the peaceable possession of a tract of land, claiming to be the owner thereof, at the suit of one who was never in possession, the judgment of the court below, in this case, should be affirmed, because the remedy of appellant was by appeal, and not by writ of prohibition. If, on the contrary, it is beyond the power of the Territorial legislature to change the nature of a proceeding by changing its name, or to dispense with the necessity for proof of a fact essential to the jurisdiction of the justice, then it is submitted with confidence that the legislature of New Mexico has attempted to authorize justices of the peace to try actions of ejectment, and that such attempt is abortive because in conflict with the organic act.

The distribution of judicial power in the Territories has been, several times, before this court, and the principle upon which this case must be decided was clearly

announced by this court in the early case of *Ferris vs. Higley*, (20 Wall. 375). The difference between that case, and this, is, that there, the court enforced an implied limitation upon legislative power, while here, the limitation invoked is express and positive. This court said:

> "But the power of the legislature to confer this jurisdiction on the Probate Courts is a much more serious question.
>
> "The organic act, in defining the power of the Territorial legislature, declares that 'it shall extend to all rightful subjects of legislation consistent with the Constitution of the United States, and with that act.'
>
> "We may, I think, assume without much hazard, that defining the jurisdiction of a Probate Court, or, indeed, of any court, may be fairly included within the general meaning of the phrase rightful subject of legislation. Nor do we think there is anything in such legislation inconsistent with the Constitution of the United States. There remains then only the further inquiry whether it is inconsistent with any part of the organic act itself.
>
> "That act established a complete system of local government. It stands as the constitution or fundamental law of the Territory. It provides for the executive, legislative, and judicial departments of government. It prescribes their functions, their manner of appointment and election, their compensation and tenure of office. In regard to the judiciary, it creates the courts, distributes the judicial power among them, and provides all the general machinery of courts, such as clerk, marshal, prosecuting attorney, etc.
>
> "It is here then, if anywhere, that we should look for anything inconsistent with the power conferred on the Probate Courts by the Territorial legislature. The ninth section of the act declares

that 'the judicial power of the Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and justices of the peace,' and it prescribes the organization and number of the District Courts. The judges of these are appointed by the President, by and with the advice and consent of the Senate of the United States. And then it declares that 'the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of the justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any matter in controversy where the title or boundary of lands may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars, and the said Supreme and District Courts, respectively, shall possess chancery as well as common-law jurisdiction.'

* * * * * *

"The common-law and chancery jurisdiction here conferred on the District and Supreme Courts, is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. The jurisdiction of the justices of the peace is specifically limited as regards the moneyed value on which it may decide, and by the exclusion of matters concerning real estate. Of the Probate Courts it is only said that a part of the judicial power of the Territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country."

Ferris vs. Higley, 20 *Wall.* 381-2.

It thus appears that justices of the peace in the Territories derive from congress all of the jurisdiction an-

ciently exercised by such officers under the English common law, and the jurisprudence of this country, subject to the limitations expressed in the act. From the time of Edward II, justices of the peace in England have had jurisdiction in cases of forcible entry and detainer, as that remedy was known to the common law; and it is probable that, from the passage of the organic act, justices of the peace would have been fully authorized to administer this remedy in the Territories, in the absence of all legislation by Territorial legislatures. That the regulation of procedure before justices of the peace is a rightful subject of legislation, and that procedure in forcible entry and detainer is subject to be regulated in the same manner as other procedure, is obvious; but this is far from saying that, under the guise of regulation, the name of the remedy may be retained, while the substance of it is destroyed. Another short quotation from *Ferris vs. Higley* will serve to illustrate this proposition:

> "It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act already cited, that the jurisdiction of the several courts therein provided for, 'shall be as limited by law.' The argument is that this refers to laws to be thereafter made by the Territorial legislature, and that as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that, in deciding what law is meant in this phrase, 'as limited by law,' we are wholly to exclude laws made by the legislature of the Territory. There may be cases when that legislature conferring new rights, or new remedies, or establishing anomalous rules of proceedings

within their legislative power, may direct in what court they shall be had. Nor are we called on to deny that the functions and powers of the Probate Courts may be more specifically defined by Territorial statutes within the limit of the general idea of the nature of Probate Courts, or that certain duties not strictly of that character may be imposed on them by that legislation.

"But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these Territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered, and any act of the Territorial legislature inconsistent with the latter must be held void."

Ferris vs. Higley, 20 *Wall.* 383-4.

The constitution of the State of Alabama contains a provision to the effect that justices of the peace shall not have jurisdiction in actions of ejectment. The legislature of that State passed an act which is sufficiently set forth in the case from which I am about to quote, giving the remedy of unlawful detainer to the purchaser of property at a tax sale, after notice to the occupant to quit, etc. This act was part of the charter of the City of Selma. In holding it to be unconstitutional, the Supreme Court of that State said:

"* * * This is the logical result of what we said in the case of *Ex parte Webb, supra*, namely: 'The proceeding the statute authorizes has, necessarily, more of the elements, and bears a greater analogy to an action of ejectment, or the statutory real action, than to an action of unlawful detainer proper. A legislative declaration that the party withholding the possession is guilty of an unlawful detainer, and that suit for the recovery of possession, and damages for the detention, may be commenced before a justice of the peace, can-

not be so construed as in effect to disseize a man of his freehold, and convert his estate into a mere right of action.' It is not within the power of the legislature to confer on justices of the peace jurisdiction in actions of ejectment, under the title of unlawful detainer."

Webb vs. Carlisle, Jones & Co., 65 *Ala.* 315.

See also:

Ex parte Webb, 58 *Ala.* 109.
Calhoun vs. Fletcher, 63 *Ala.* 574.

In many of the States, the nature of this remedy has been revolutionized by statute, and unless there exists some constitutional obstacle, the right of State legislatures to enlarge the issues in such a case is beyond question. This court, construing the statute of the State of Missouri, has affirmed the doctrine that evidence of title may be admissible in such a case, in view of the provisions of the statute of that State, (*Lehnen vs. Dickson*, 148 *U. S.* 71); and, in construing a statute of the State of Arkansas, Mr. Justice Miller, delivering the opinion of this court, said:

"* * * The language of the presiding judge in his charge to the jury in this case meets our entire approval, and we quote from it as follows:

" 'The law will not sanction or support a possession acquired by such means, but will, on the contrary, when appealed to in this form of action, compel the party who thus gains possession to surrender it to the party whom he dispossessed, without inquiring which party owns the property or has the legal right to the possession. If the law was otherwise, force, the exhibition and use of deadly weapons, and threats of personal violence, would speedily take the place of lawful and peace-

ful methods of gaining possession of property. The law compels a defendant, found guilty of a forcible entry and detainer, to restore the possession. After he has restored the possession so forcibly and wrongfully acquired, he can then proceed in a lawful manner to assert his claim to the property; but he cannot have his legal rights to the property, or its possession, adjudged or determined, in the action of forcible entry and detainer, when, by his own admission, or the proof in the case, he is shown to be guilty of a forcible entry and detainer. If, therefore, you find that the plaintiff built the eighteen miles of road in controversy, and had been in the quiet and peaceable possession of the same from the time of its completion, claiming the right to such possession under the contract, and that, while so in the quiet and peaceable possession of the road, Bailey, the president of the defendant corporation, with a force of men acting in the name and on behalf of the defendant corporation, by force and strong hand, or with weapons, or by threatening to kill, maim or beat, or by such words and actions as have a natural tendency to excite fear or apprehension of danger, drove the plaintiff's agents or employes out of his cars and off the road with the declared purpose of retaining the possession of the same, then the defendant corporation is guilty of a forcible entry and detainer within the meaning of the statutes of this State, and the plaintiff is entitled to your verdict.'

"In this view of the case, nearly all the questions raised by counsel for plaintiff in error, in regard to the contract under which Johnson built this eighteen miles of road, and held possession of it, and his right to hold possession, are immaterial. The jury must have found, under this charge, that he was in the peaceable and quiet possession of the property, and was ejected from it by the force and violence and wrong-doing of the Iron Mountain

and Helena Railroad Company. They were not bound to inquire any further, nor are we bound to answer other questions."

Iron Mountain & H. R. R. vs. Johnson, 119 *U. S.* 611-613.

The statute of Arkansas, which is set out in the report of the case from which the last quotation is made, follows the early English statutes so closely that it may be fairly said to be no more than declaratory of the common law rule on the subject; and it is deemed unnecessary to enlarge this brief by argument or citation in support of the proposition that force was the essential element of this form of proceeding, or that it was, and must ever remain, wherever the supremacy of the common law is maintained, fundamentally a remedy for the preservation of the public peace, and for the protection of the occupant, in the actual and peaceable possession of lands and tenements. Neither is it deemed necessary to discuss the relations, rights and remedies of landlords and tenants, there being no allegation in any of the complaints that that relation had ever existed between the plaintiff and the several defendants—the affidavit, upon which the writ of prohibition was issued, (which must be taken as true), setting up that Alexander was in possession, claiming as owner. The subject is ably discussed in a note to 2 *Taylor Landlord and Tenant, Sec. 717*, where many cases are collected; attention is especially invited to the case of *Perkins vs. Towle*, (58 N. H. 425) one of the cases there cited, where it is said on page 426:

" * * no provision of any English or provincial act in force here, and no practice prevailing

before, at the time of, or since the adoption of the constitution, has recognized the jurisdiction of justices of the peace, or imposed burdensome restrictions upon a free right of trial by jury in real and possessory actions, where the relation of landlord and tenant did not exist, until the enactment of Sec. 23 of the landlord and tenant act, on the adoption of the General Statutes in 1866. The enactment was not within the constitutional power of the legislature, and that section is void. The case is one in which the defendant, without regard to the question of title, had a right to a trial by jury, and a justice of the peace had no jurisdiction."

In the only case in which the question had been squarely presented to the Supreme Court of New Mexico prior to the passage of the act of 1889, that court held that actual, physical force must characterize the entry or detention of land, to entitle the party to this remedy.

" * * The legal title to land, or even the right to the possession of land, cannot be determined in this form of action. The main point on which every forcible entry and detainer suit must be maintained, if at all, is the fact that the defendant by the mode of his entry or detention has committed a wrong in the nature of a public offense, and the object of the statute is to punish the wrongdoer by a restitution of the premises to the plaintiff without inquiry as to which has the legal right of possession.

"It is claimed by counsel for the appellee on the argument of the case, that every unlawful entry upon land is necessarily a forcible entry within the meaning of the statute. With this view we can not concur. There may be a peaceful entry by one person upon the lands of another without actual force, stealth, intimidation, or fraud, under an

honest though mistaken belief that he had a legal right to the possession.

"While such an entry might be without the authority of law, it would be a trespass simply, and not within the statute of forcible entry and detainer. It is clear that an unlawful entry, unaccompanied by actual force, is insufficient to maintain this action, on the ground of its being constructively a forcible entry."

Romero vs. Gonzales, 3 *N. M.* 7-8.

It is disclosed by this record that appellant, by himself, and his tenants, was in the possession of the five tracts of land, with the houses thereon, of which Cleland sought to obtain possession; that appellant built the houses, and that he had a suit pending in the district court, by which he sought to establish his title to these and other lands in Bernalillo county. Neither the answer, nor the affidavit, sets forth the nature of this pending action, except that it was on the equity side of the court, where the fact of possession may have been essential to the jurisdiction of the court of equity. If appellant was seeking to quiet his title, and that is certainly one method of establishing his title, possession was essential to enable him to maintain the action, (*Orton vs. Smith*, 18 *How.* 263). Is it possible that the jurisdiction of the district court, in such a case, is subject to be defeated by the action of a justice of the peace in a proceeding where the party invoking the aid of the justice has never had actual possession of the land in controversy? It seems impossible that this can be so; yet if the action of the supreme court of New Mexico in quashing this writ of prohibition was right, it is so.

C. L. N. M. 1897, *pp.* 731-732, *Secs.* 2775-2780.
9 *Stat. pp* 449-450.
C. L. N. M. 1897, *Sec.* 3256.
C. L. N. M. 1865, *pp* 178-180.
Laws of 1889, *p.* 224.
Romero vs. Gonzales, 3 *N. M.* 5.
C. L. N. M. 1897, *Secs.* 3160, 3164, 3166, 3168, 3172, 3173, 3345, 3352.
C. L. N. M. 1897, *Secs.* 3358-3361.
Smith vs. Whitney, 116 *U. S.* 167.
Ferris vs. Higley, 20 *Wall.* 375.
Webb vs. Carlisle, Jones & Co., 65 *Ala.* 315.
Ex parte Webb, 58 *Ala.* 109.
Calhoun vs. Fletcher, 63 *Ala.* 574.
Lehnen vs. Dickson, 148 *U. S.* 71.
Iron Mt. etc. R. R. vs. Johnson, 119 *U. S.* 612.
2 *Taylor Landlord and Tenant, Sec.* 717, *note.*
Perkins vs. Towle, 58 *N. H.* 425.
Orton vs. Smith, 18 *How.* 263.
Haller vs. Blaco, 14 *Neb.* 195.
Comstock vs. Cole, 28 *Neb.* 470.
Spurck vs. Forsyth, 40 *Ill.* 438.

III.

THE REMEDY BY APPEAL WAS WHOLLY INADEQUATE.

The statute of New Mexico regulating appeals from

justices of the peace provides that on such appeals the trial shall be *de novo;* but of what avail is such an appeal where the inferior court was without jurisdiction of the subject matter? The court could only dismiss the case for want of jurisdiction in the justice of the peace, and while it probably could adjudge the costs of the district court against the plaintiff below, it is, to say the least, doubtful whether it could adjudge the costs incurred in the lower court against him. In order to take the appeal, appellant would have been subjected to the necessity of giving onerous bonds to cover double the value of the rents accrued up to the rendition of the judgment in the district court, there being no provision for such an appeal without the giving of a bond; the judgment of the district court dismissing the case would, in no manner, settle the controversy, or prevent the institution of similar suits before the same justice of the peace, and appellant could be worn out, and have his means exhausted by litigation in an inferior tribunal, endeavoring to protect his possession, pending a litigation where the rights of the parties could be definitely and finally settled.

> "We are of opinion that the justice of the peace had no jurisdiction to try the case after the sworn answer of the defendant was filed and that it was his duty to certify it for primary trial to the District Court. When removed there on appeal, it should have been dismissed, because there could have been no lawful trial before the justice."
>
> *Langford vs. Monteith*, 102 *U. S.* 147-148.
>
> " * * * Other cases cited hold that when the want of jurisdiction appears on the face of the papers the court in which suit is brought should refuse to take jurisdiction, and that when such

papers have been filed the court should strike them from the files. In such cases costs should not be taxed, because there is no adjudication. They have no application to a case of which the court has assumed jurisdiction, and rendered judgment, and an appeal has been taken, and the appellate court has jurisdiction to dismiss the suit. In such a case the right to adjudge the *costs of the appeal* is implied. The court holds that the costs of the appeal complained of were properly adjudged against the plaintiff."

Cereghino vs. Third Dist. Ct. of Utah, et al., 32 *Pac.* 699; 8 *Utah*, 459.

"* * * An appeal would have been, therefore, only an empty form, and would have settled nothing except that there could be 'no lawful trial before the justice;' and hence none before the district court. Actions in court are for the settlement of some matter in dispute, and not to compel parties to submit to the expense and trouble of going through certain forms, with no beneficial object in view, and before an officer whose final decision is utterly void, and of no binding force. They have the right to be saved from such annoyance and vexation, and to have a tribunal acting without jurisdiction prevented from harassing them by suits and judgments which settle nothing, and accomplish no good purpose."

Ducheneau vs. House, 10 *Pac.* 840-841.

"As this court has often said: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.'"

In re Sawyer, 124 *U. S.* 220.

The motion to quash the writ of prohibition, which was sustained by the supreme court of New Mexico, although purporting to rest on six grounds, really advanced but two propositions as reasons why it should be granted:

First—That the appellee had jurisdiction of the subject matter of the actions; and,

Second—That appellant had an adequate remedy by appeal.

In the first point of this brief, it is conceded, that if the first proposition is well taken, the judgment of the supreme court of New Mexico was right, and a like concession is here made as to the second proposition. If the remedy by appeal was adequate, there is no error in this record.

Langford vs. Monteith, 102 *U. S.* 147.
Cereghino vs. Third Dist. Ct. of Utah, et al., 8 *Utah*, 459; 32 *Pac.* 699.
Ducheneau vs. House, 10 *Pac.* 840.
In re Sawyer, 124 *U. S.* 220.
Eckels vs. Wolf, 55 *Ill. App.* 310.
Abbott vs. Kruse, 37 *Ill. App.* 549.
Mining Co. vs. District Court, 7 *N. M.* 486.

IV.

APPELLANT WAS ENTITLED TO THE WRIT OF PROHIBITION AS A MATTER OF RIGHT.

No opinion was filed by the supreme court of New Mexico in this case, and counsel for appellant can, therefore, only speculate as to the probable reasons which controlled the court's action. In the case of *Tapia*

vs. Martinez, (4 N. M. 329,) which was an application by Tapia for a writ of prohibition against a justice of the peace, and the sheriff, to prohibit proceedings in the court of the justice whereby one Rodriguez sought to obtain, by a writ of replevin, possession of a crop of growing corn, as well as some wheat and straw which had been severed, the court decided that a writ of prohibition was not the proper remedy, saying:

> " * * Conceding that a justice of the peace has no jurisdiction to try the title of real estate, it is not perceived that this ground entitles the petitioner to the writ of prohibition. If it could be shown that the defendants were trespassers, as charged in the petition, that fact alone would not entitle him to the writ as prayed for. The case, as it is presented by the defendants in their answer, seems to have been conducted as usual in the courts of justices of the peace. The plaintiff made affidavit, gave bond, and apparently complied with legal requirements before the justice issued the process; it was properly directed to the officer, and from his answer, and, so far as the proceedings disclose his acts, he did nothing but execute the process as he was required to do. There was no trial in the justice's court; he had made no ruling on the question here complained of; no objection had been made to his proceedings, and no opportunity afforded him to decide on his jurisdiction to try the case; the presumption is that he would have done his duty if the objection had been made. The great weight of authority is that relief must first be sought in the court below."

Pp. 333-334

This case is unique upon its facts, and is probably the only one to be found in which a resort to replevin for a growing crop was ever sustained; but, whether

or not it was well decided, it is easily distinguishable from the case at bar, because appellant, in the case at bar, did object to the proceedings before the justice, and afforded him an opportunity to decide on his jurisdiction to try the case. The principle invoked by appellant is established by numerous decisions of this court. It is well stated by the chief justice in Rice's case:

> "Where it appears that the court whose action is sought to be prohibited has clearly no jurisdiction of the cause originally, or of some collateral matter arising therein, a party who has objected to the jurisdiction at the outset, and has no other remedy, is entitled to a writ of prohibition as a matter of right. But where there is another legal remedy by appeal or otherwise, or where the question of the jurisdiction of the court is doubtful, or depends on facts which are not made matter of record, or where the application is made by a stranger, the granting or refusal of the writ is discretionary. Nor is the granting of the writ obligatory where the case has gone to sentence, and the want of jurisdiction does not appear upon the face of the proceedings."

In re Rice, 155 *U. S.* 402-403.

It is insisted that the case made by the appellant is clearly within this rule; that, if it was desired to controvert any allegation contained in the affidavit, there should have been a return to the writ of prohibition; and that, in the absence of such return, the facts stated in the affidavit must be taken as true, and when so taken, they conclusively establish the want of jurisdiction in the justice of the peace whose action was sought to be prohibited.

Tapia vs. Martinez, 4 N. M. 329.
In re Rice, 155 U. S. 402.
Mining Co. vs. District Court, 7 N. M. 486.
In re Cooper 138 U. S. 404.
In re Cooper 143 U. S. 472.

I respectfully submit that this court has jurisdiction to entertain this appeal, and that the judgment of the court below is erroneous.

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